

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HEIDI A. BAER,

Plaintiff,

v.

NATIONAL BOARD OF
MEDICAL EXAMINERS,

Defendant.

Civil Action No.
05-CV-10724-GAO

SECOND AFFIDAVIT OF JOSEPH E. BERNIER, PH.D.

Joseph E. Bernier, Ph.D., having been duly sworn, hereby deposes and says:

1. My name is Joseph E. Bernier, Ph.D.

2. I hold a Doctorate in Philosophy (Ph.D.) in Counseling Psychology from the University of Minnesota. I am currently the Assistant Director for Training & Clinical Evaluation at University Counseling Center of the State University of New York at Albany, where I specialize in the assessment and treatment of adolescents and adults with learning disabilities and other psychiatric conditions. In addition to my practice assessing and treating patients, I am also an expert on learning disabilities and the Americans With Disabilities Act (“ADA”), and I serve as a consultant and consultant examiner to national, state, and local organizations, including the National Board of Medical Examiners (“NBME”), on issues related to learning disability determinations, test accommodations, and other disability-related matters. I am a licensed psychologist in New York State (#005849-1). I have published numerous journal articles, book chapters, as well as a book entitled Diagnosis of Learning Disability in Adulthood (Allyn & Bacon, 2003). A copy of my curriculum vitae is attached hereto at Exhibit A.

3. I am submitting this affidavit in response to the second affidavit of Dr. Cheryl Weinstein and Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for a Permanent and Preliminary Injunction submitted in this case on April 26, 2005, as a supplement to my affidavit filed on April 22, 2005.

4. In paragraphs 5 and 6 of her April 27th affidavit, Dr. Weinstein adopts her own standards for what is "average" (25th to 75th percentile), because she considers the well-established and generally accepted standards for evaluating test scores as "simply too harsh" on my part. The normal distribution parameters in which 68% of the population falls within one standard deviation from the mean and are thus "normal" or "average" which I used to evaluate the scores are universally accepted in psychology and other scientific fields. Accordingly, they are not idiosyncratic or arbitrary distinctions I have drawn.

5. The test results reviewed in my report dated December 6, 2004 were not based on an arbitrary selection process but rather based on my professional judgment and experience. The tests I selected were in my professional opinion, those that most accurately reflect reading skills and reading-related cognitive abilities.

6. The California Verbal Learning Test-Second Edition (CVLT-II) is a test of the broad cognitive ability known as "long-term storage and retrieval," which has been demonstrated to be related to reading, especially in the early years, but not in the form measured by the CVLT-II.

7. Accordingly, I did not highlight Ms. Baer's CVLT-II scores in either my December 6, 2004 report to the NBME or in my April 22, 2005 affidavit in this case because, in my professional opinion the relevance of Ms. Baer's CVLT-II scores to her ability to read and perform timed, written tests is not readily apparent.

8. Moreover, in August of 2003, Dr. Penny Prather evaluated Ms. Baer using the Wechsler Memory Scales Third Edition (WMS-III). Dr. Prather's report indicates that Ms. Baer scored between the 37th and 63rd percentiles when learning word lists (WMS-III Word Lists). Like the CVLT-II, "Word Lists" measures free recall memory. Therefore, Ms. Baer's average performance on the WMS-III Word List tests is inconsistent with Dr. Weinstein's suggestion that Ms. Baer is disabled in this area.

9. An individual's ability to rapidly retrieve words and names is a marker of "long term memory and retrieval" and is frequently identified as a correlate of reading at selected ages. Three interpretable tests of word retrieval fluency appear in Ms. Baer's six evaluations between 1985 (Dr. Boyle) and 2004 (Dr. Weinstein). She performed within the average range on all three. In August of 2003, Dr. Penny Prather evaluated Ms. Baer using the Boston Naming Test. She reported a score that is between the 53rd and 59th percentiles. This is an average score. In March of 2004, Dr. Marilyn Engleman evaluated Ms. Baer using two tests of retrieval fluency. She reported that Ms. Baer earned a score on the Woodcock Johnson Third Edition (WJ-III) test "Rapid Picture Naming" that is at the 17th percentile. This is a marginally average score. Dr. Engleman also reported that Ms. Baer earned a score on the WJ-III test "Retrieval Fluency" at the 45th percentile. This is also an average score. Dr. Weinstein provided only raw scores on similar tests, such as "Animal Naming" and "FAS," which are meaningless without their percentile comparisons and some indication of the norms used. Therefore, Ms. Baer's performance is in the range of normal on interpretable specific reading-related tests of long term memory and retrieval.

10. Additional evidence of Ms. Baer's "normal ability" to rapidly retrieve words is present in the evaluations performed by Drs. Engleman and Weinstein in 2004. In March of

2004, Dr. Engleman evaluated Ms. Baer using the Writing Fluency test from the Woodcock Johnson-Third Edition. She reported a score at the 93rd percentile. In August of 2004, Dr. Weinstein reported a score for Ms. Baer at the 25th percentile on the Writing Fluency Test. Though the scores are disparate, they are average (or better) and contribute to the conclusion that Ms. Baer is not disabled in her ability to rapidly retrieve words .

11. Concerns about Ms. Baer's ability to read fluently repeatedly appear in the documentation provided by and on behalf of Ms. Baer. Interpretable scores for six tests of reading fluency, or reading proficiency, appear in the six evaluations between 1985 (Dr . Boyle) and 2004 (Dr. Weinstein). Ms. Baer performed within the average range on four of the six tests. In October of 1998 Dr. Christopher Connolly evaluated Ms. Baer using the timed Reading Comprehension test from the Nelson Denny Reading Test-Form G. He reported a scaled score of 216, which is an average score. In March of 2003, Danielle Kerns evaluated Ms. Baer using the Reading Fluency test from the Woodcock Johnson Third Edition (WJ-III). She reported a raw score of 45, which is a score that is at the 11th percentile for someone of Ms. Baer's age and is a below average score . However, in March of 2004, Dr. Engleman evaluated Ms. Baer also using the Reading Fluency test from the WJ-III. She reported that Ms. Baer had achieved a score on this test that is at the 57th percentile, which is an average score. Dr. Engleman also evaluated Ms. Baer using the timed Reading Comprehension test from the Nelson Denny Reading Test-Form H. She reported that Ms. Baer earned a scaled score of 190, which is an average score. In August of 2004, Dr. Weinstein evaluated Ms. Baer using both the WJ-III Reading Fluency and Nelson Denny- Form G timed Reading Comprehension tests. She reported Ms. Baer's score for Reading Fluency as at the 13th percentile, which is a score that is below average. However, she also reported that Ms. Baer had earned a scaled score on the timed Reading Comprehension test

of 185, which is an average score. The weight of this evidence documenting Ms. Baer's ability to fluently read and understand sentences and passages is clearly in favor of "average reading."

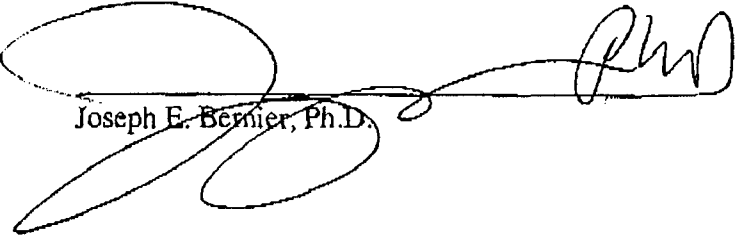
12. As such, most of these testing records lead to the conclusion that Ms. Baer's reading abilities are average. While she may be underperforming on some tests at certain times, she performed in the average range most of the time.

13. Dr. Weinstein also makes reference to a consistent pattern between her findings and those of Drs. Prather and Connolly. Indeed, I agree that a pattern exists in Ms. Baer's testing results. That pattern, however, is one of generally average or better performance on diagnostic testing—not of a learning or reading disability or deficit.

14. More importantly, in order for a disability to exist, whatever mental or "cognitive" impairments an individual may have must have an impact on the person's functional ability. Ms. Baer has demonstrated no such functional impairment. Indeed, she has succeeded without accommodation on standardized tests such as the PSAT and SAT. She also gained admission to and did well academically at Duke University.

15. In sum, it remains my professional opinion, as stated in my four reports to the NBME and prior affidavit in this case, that Ms. Baer does not suffer from any reading-related disorder or disability, in comparison to the general population, and thus Ms. Baer should not be granted extra time on the NBME on the basis of either reading or learning disability.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 28TH DAY OF
APRIL, 2005.



Joseph E. Bernier, Ph.D.

EXHIBIT A

JOSEPH E. BERNIER, Ph.D.
University Counseling Center
University at Albany
State University of New York
Albany, New York 12222
(518) 442-5800
E-MAIL: jbernier@uamail.albany.edu

VITA

EDUCATION

Ph.D. (1976) University of Minnesota, Minneapolis, Minnesota Program: Counseling Psychology, APA Approved (Supporting Area: School Psychology)
B.A. (1973) Westfield State College, Westfield, Massachusetts Major: Psychology
Minor: Special Education

PSYCHOLOGY LICENSURE

New York (awarded 1978)

CERTIFICATION

Health Service Provider in Psychology
Council for the National Register of Health Service Providers in Psychology
(awarded 1983)
New York State Office of Vocational & Educational Services for Individuals with Disabilities -Approved Neuropsychological Examiner

PRESENT POSITION

Psychologist and Assistant Director for Training and Evaluation Services
University Counseling Center
University at Albany
State University of New York
Albany, NY 12222 (1991-present)

Provide clinical and developmental psychological services to university students and consult with staff and student groups as appropriate. Coordinate, supervise and personally provide clinical / psychological and psychoeducational assessment services provided through the University Counseling Center, including the evaluation of learning disorders and other neurodevelopmental conditions compromising academic performance. Function as a consultant / liaison to the University's Disabled Students Services Office. Coordinate and manage all facets of advanced practicum, post practicum, and pre-doctoral internship training programs at UCC. Direct the development of an APA approved pre-doctoral internship at the University Counseling Center. Participate in University related committee work. Tenure awarded 1997.

CONSULTANTSHIPS

Office of Test Accommodations, National Board of Medical Examiners, Market Street Philadelphia, PA (1998-present)

Critically review psychological documentation provided by medical students who seek disability status and testing accommodations on the national medical licensing under the ADA.

Northeastern Association for the Blind at Albany Washington Avenue, Albany, NY (1978-present)

Conduct comprehensive psychological and neuro-psychological evaluations of blind and multi-handicapped rehabilitation clients and consult with staff on case management/programming.

Consultative Examiner, NYS Office of Temporary and Disability Assistance/Division of Disability Determinations (2000 - Present). Conduct psychological and neuro-psychological examinations on children and adults who seek disability benefits.

Independent Medical Examiner, Forest Hills IPA, Forest Hills, New York. (2003-present)
Perform consultative psychological and neuropsychological examinations for FHIPA client groups.

INDEPENDENT PRACTICE

Psychologist, independent practice specializing in psychodiagnostic services and psychoeducational / neuropsychological evaluations of children, adolescents, and adults (1978-present)

Office Location:
5 Pine West Plaza, Suite 508
Washington Avenue Extension
Albany, New York 12205
(518) 452-4232

PAST POSITIONS

Psychologist, Four Winds Hospital, Saratoga Springs, New York (1988-1991)

Psychologist on the College Service inpatient unit doing intensive, individual psychotherapy, group therapy, family treatment, psychological testing (College Unit and adult units), admissions, and case management. Performed psychodiagnostic and neuropsychological evaluations for all in-patient units as part of the Psychological Testing Service.

Psychologist & Director, Psychological Counseling Center, Siena College, Loudonville, New York (1987-1988).

Administered a college psychology and counseling service that offered a range of clinical services to students, faculty, and college employees. Provided clinical supervision to professional staff- 6 clinicians, including psychology interns, counselors, and psychiatry residents. Personally performed psychodiagnostic evaluations, learning disability assessments, short and long-term psychotherapy, career counseling, clinical consultation with Student Affairs and Health Services Staff.

Psychologist & Director, Psychological Counseling Service, The College of St. Rose, Albany, New York (1980-1987)

Developed a college psychology service. Personally provided a variety of clinical psychological services to students and members of the college community, including psychodiagnostic services, learning disability evaluations, individual and group psychotherapy, crisis intervention, career counseling, outreach programs, consultation to Student Affairs staff and clinical supervision of psychology interns and medical residents.

Assistant Professor, Department of Counseling Psychology and Student Development State University of New York at Albany, Albany, New York (1976-1980)

Teaching and clinical supervision of doctoral and masters psychology students, advising graduate students and conducting/supervising research.

Faculty Clinical Associate, University Counseling Service, State University of New York at Albany, Albany, New York 12222 (1976-1980)

Provided individual psychotherapy to college students.

Visiting Assistant Professor, Faculty of Education, University of Western Ontario London, Ontario, Canada (Summer 1976)

Taught graduate level counseling course.

Psychology Intern, ("Captive Internship") Deliberate Psychological Education Program
Department of Psychoeducational Studies, University of Minnesota and Freemont
Community Health Center / Freemont Connection, Minneapolis, Minnesota
(1974-1976)

Psychotherapist for adults, children, and families; outreach and training for inservice
counselors and teachers to implement developmental models of primary prevention and
psychological growth, conducting psychological and psychoeducational evaluations with
children and adolescents.

Psychotherapist, Walk-in Counseling Center, Minneapolis, Minnesota (1975-1976)

Individual short-term psychotherapy with adults in a community walk-in clinic..

Psychology Clerkship, Marcy Open School and Tuttle School Minneapolis, Minnesota (9/73-
6/75)

Provided psychological / psychoeducational evaluations, psychological counseling with
elementary-aged children and parents; consultation with teachers; implemented programs
with children aimed at primary prevention.

PUBLICATIONS

Flanagan, D., Keiser, S. Bernier, J., and Ortiz, S. Diagnosis of Learning Disability in Adulthood,
Boston, Allyn and Bacon (2003).

Sue, D. W., Bernier, J. E., Durran, A. Feinberg, L., Pederson, P., Smith, E. J., and Vasquez,
Nuttal, E. (1982) Position Paper: Cross Cultural Counseling Competencies. The Counseling
Psychologist, 45-52.

Grand, S. A., Bernier, J. E., and Strohmer, D. C. (1982). Attitudes Towards Disabled Persons as
a Function of Social Context and Specific Disability. Rehabilitation Psychology, 27 (3), 1965-
1974.

Bernier, J. E. (1981). Families, Children, and Change: An application of Ecological Psychology.
Counseling and Values, 25 (2), 85-100.

Bernier, J. E. (1980). Training and supervising counselors: Lessons Learned from Deliberate
Psychological Education. Personnel and Guidance Journal, 59 (1).

Sprinthall, N. A., and Bernier, J.E. (1970). Ego and Cognitive Development for Teachers: A Neglected Arena. Chapter for T. Hennessey (Ed.). Values/Moral Education, Paulist Press, New York.

Bernier, J. E. (1978). Developmentally based teacher education: A pilot project. *Texas Tech Journal of Education*, 5 (2).

Sprinthall, N.A., and Bernier, J. E. (1978). Moral and Cognitive Development of Teachers. *New Catholic World*, (1 324), 179-184.

Bernier, J. E. (1977). Psychology of Counseling Curriculum: A follow-up study. *The Counseling Psychologist*, 6 (4), 18-21. (Co-author: Kenneth Rustad; Reprinted in Whitely, J. (Ed.), *Developmental Counseling and Teaching*, Monterey, California: Brooks/Cole).

Bernier, J. E. (1977). The new contraception program: A psychological perspective, Chapter for C. Garfink and H. Pizer, *The New Birth Control Program*. New York-Bolder.

Bernier, J. E. (1976). Active-listening Skills for Staff Development - A Workbook. St. Paul, Minnesota: Minnesota Department of Education.

Bernier, J. E. (1976). A psychological education intervention for teacher development. Unpublished doctoral dissertation, University of Minnesota.

SELECTED POSTGRADUATE TRAINING

Highlights of continuing education in neuropsychology, clinical and personality assessment, and brief psychological interventions. A comprehensive list is available upon request.

Rorschach Workshops "Annual Rorschach Workshop", Presenter: John E. Exner, et. al., Asheville, NC, 4 days, 21 credit hours, September 2003

"Neuropsychology of the Civilized Mind", Presenter: Elkhonon Goldberg, Ph.D., Cape Cod Institute, 5 days, 15 credit hours, July 2002

"Rorschach Comprehensive System: Update and Advanced Interpretation", Presenter: Barry Ritzler, Ph.D., Rorschach Workshops, three days each, May 2001 and May 2004, Albany, NY

"Violence Risk and Threat Assessment", Presenter: J. Reid Meloy, Ph.D., Specialized Training Services, Inc., (San Diego, CA), two days, June 2000, Albany, NY

"Advanced Interpretation of the Comprehensive System Rorschach", Presenter: Barry Ritzler, Ph.D. LIU/Rorschach Workshops, three days, June 2000, Albany, NY

"The Comprehensive System Rorschach: Advanced Interpretation", Presenter: Barry Ritzler, Ph.D., LIU/Rorschach Workshops, three days, May 1999, Albany, NY

"Rorschach Alumni Workshop", Presenters: John E. Exner, Ph.D., & Irving Weiner, Ph.D., Rorschach Workshops, Asheville, NC, three days, September 25-28, 1997, 21 CE Credits

"Integrating Rorschach and Neuropsychological Assessment", Presenters: Anthony Sciara, Ph.D., & Jeffrey Barth, Ph.D., Rorschach Workshops, Asheville, NC, three days, May 1996, 21 CE credits

"Two's Company, Three's Allowed: Psychopharmacology for Therapists", Presenter: J. Hullett, MD, Value Behavioral Health, Inc., April 1996, Scotia, NY

"Forensic Issues for the Practicing Clinician", Presenter: Alan M. Goldstein, Ph.D., PANNY, March 1996, Albany, NY, 3 CE credits

"Neurodevelopmental Assessment", Presenter: Janet Holmes-Bernstein, Ph.D., Einstein Institute, Einstein College of Medicine, five days, July 1995, 15 CE credits

"Training Models for Brief Psychodynamic and Solution-Oriented Therapy", Presenter: Elenor Bossie, Ph.D., ACCTA, Truckee, CA, October 1994, 1.5 CE credits

"Developmental Psychopathology", Presenter: Sir Michael Rutter, MD, Einstein Institute, Einstein College of Medicine, July 1993, five days, 15 CE credits

"The Comprehensive System Rorschach: Advanced Interpretation", Presenter: John E. Exner, Ph.D., Einstein Institute, Einstein College of Medicine, July 1992, five days, 15 CE credits

"Short-term Anxiety Provoking Psychotherapy", Presenter: Peter Sifneos, MD, Stratton VA, April 1992, Albany, NY

"Time-Effective Psychotherapy", Presenter: Simon Budman, Ph.D., Value Behavioral Health, Winter 1992, Albany, NY

"Short-Term Dynamic Psychotherapy", Presenter: Habib Davenloo, MD, two days, May 1991, Syracuse, NY, 14.5 CE credits

"Brief & Emergency Psychotherapy", Presenter: Leopold Bellak, MD, December 1987, New York, NY

"Myers Briggs Type Indicator Workshop for Career Professionals", Adirondack Community College, two days, December 1987, Glens Falls, NY

"Adolescent Treatment", Presenter: Derek Miller, MD, Einstein Institute, Einstein College of Medicine, five days, 15 CE credits

"Adult Neuropsychology", Presenter: Arthur Benton, Ph.D., Einstein Institute, Einstein College of Medicine, five days, 15 CE credits

"Disorders of Personality", Presenter: Theodore Millon, Ph.D., one day, May 1985, 6 CE credits

"The Neuropsychological Evaluation of School-aged Children", Presenter: Lawrence C. Hartlage, Ph.D., one day, November 1984, Albany, NY, 6 CE credits

PROFESSIONAL AFFILIATIONS

Member, American Psychological Association (APA)

Member, Association of Counseling Center Training Agents

Member, Society for Personality Assessment

REFERENCES

Furnished upon request.

4/28/2005